88-508

Supreme Court, U.S.
FILED
SEP 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ANTHONY BRYSON, et al.,
Petitioners,

V.

CITY OF DERIDDER AND
PARISH OF BEAUREGARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

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75pp

QUESTIONS PRESENTED

1. Where Congress has by statute established standards for determining whether reliance on previously-established law shall provide a defense to a class of claims, may a court disregard that statute and adjudicate that defense under the judge-made standards of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)?

2. Did the Court of Appeals manifestly and seriously misapply the standards of Chevron Oil?

3. Where this Court has overruled a prior precedent, may the Court of Appeals determine that the reversing decision eradicates the legal bases found within the overruled precedent, yet the Court of Appeals adjudicates the merits of the case on the basis of the old rule?

4. Did the Court of Appeals manifestly and seriously misapply the

standards of **National League of Cities v. Usery**, 426 U.S. 833 (1976)?

LIST OF PARTIES

Petitioners are the following individuals:

Anthony Bryson

George Lankford

Bennie Lewis

Donnie Lewis

Roger L. Pickle

John Satcher, Jr.

Respondents are the following local governments which are political subdivisions of the State of Louisiana:

City of DeRidder

Parish of Beauregard.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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OF THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is not reported, and is reproduced at pp. 1a-9a of the Appendix, infra ("A.__"). The two opinions of the District Court are not reported; both are reproduced at A. 10a-11a and at A.12a-30a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1988. A.1a. The District Court had jurisdiction under 28 U.S.C. SS 1331 and 1337. On August 15, 1988, Justice White extended the time for filing this petition to and until September 22, 1988. This Court has jurisdiction under 28 U.S.C. S 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves SS 7(a)(1) and 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. SS 201 et seq. ("FLSA"), and S 10 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. SS 251 et seq. ("Portal Act"). This case also involves 29 C.F.R. SS 775.2-775.4. These provisions are reproduced at A.31a-43a.

STATEMENT OF THE CASE

A. The National League of Cities

Decision and DOL's Implementing Regulations

In Supreme Court No. 88-39, Garcia v. San Antonio Metropolitan Transit Authority, a closely related case raising the same basic questions presented here and which is presently pending before this Court on a petition for a writ of certiorari, petitioners succinctly stated the course of proceedings from National League of Cities v. Usery, 426 U.S. 833 (1976) ("National League") to the Department of Labor's implementing regulations at 29 C.F.R. SS 775.2-775.4.[1] We therefore incorporate that discussion here and briefly note that in National League this Court held that the

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[1]Garcia certiorari petition, No. 88-39 at pp. 2-4; for respondents' convenience we are sending three copies of that petition to each respondent with the service copies of the petition herein.

Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the FLSA "to directly displace the states" freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. Under this standard, some, but not all, governmental operations were constitutionally immune from the FLSA.[2] After proceedings were held on remand in National League [3], the Department of Labor published as interpretive rules lists of "nontraditional" and "traditional" functions. See 29 C.F.R. SS 775.2-775.4.

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[2]The Court identified several operations which were immune under this test (id. at 851 and n.16) and one (carriage by rail in interstate commerce) which was not (id. at 854, n. 18)

[3]See Garcia certiorari petition, No. 88-39 at pp. 2-4 for a description of these proceedings.

Ambulance services - the services at issue here - are not mentioned in National League and have never been listed since the DOL's interpretive rules were published in 1979 as either "nontraditional" or "traditional" functions. 29 C.F.R. SS 775.3(b) and 775.4(b).

B. Proceedings In District Court

Respondent City of DeRidder ("City") is a city in Beauregard Parish, Louisiana. Beauregard Parish ("Parish") is one of sixty-four Louisiana parishes. Both are political subdivisions of the State of Louisiana having their own respective governments separate and apart from the other.

Petitioners Anthony Bryson et al., who as of June 26, 1984 were employed by the City and Parish in the City-Parish

Ambulance Service, were not receiving overtime pay at a one and one-half times multiple of their base rate for the hours in excess of forty (40) in a workweek for which they had provided their labor services. Believing that the Ambulance Service was not a "traditional/integral" function under **National League**, under any DOL interpretive regulation, and/or under any other extant authority, petitioners filed suit on June 26, 1984 claiming unpaid FLSA overtime pay. Both respondents filed Answers.

On February 15, 1985 the City filed a Federal Rule of Civil Procedure ("FRCP") 12(b)(1) and/or (6) Motion to Dismiss for lack of subject matter jurisdiction and/or for failure to state a cause of action on which relief could be granted.

On February 19, 1985, this Court decided **Garcia v. San Antonio Metropolitan**

Transit Authority, 469 U.S. 528 (1985) (hereinafter "Garcia I") by overruling **National League** and holding that Congress may constitutionally apply the FLSA to all state and local government employees.

Petitioners thereafter moved for partial summary judgment under FRCP 56(a), contending that **Garcia** I should be retroactively applied and liability imposed for the relevant time sued for in the Complaint. Petitioners argued in the alternative that if **Garcia** I were not retroactively applied, then sufficient genuine issues of material disputed fact had been presented in petitioners' simultaneously filed opposition to necessitate a trial on the merits concerning the Ambulance Service being a "traditional" and/or an "integral" function.

On May 16, 1985, the district court

(Veron, J.) granted petitioners' motion for partial summary judgment as per Garcia I for the time after February 19, 1985. Judge Veron, however, dismissed petitioners' claims for time prior to February 19, 1985. See A.10a-11a.

Petitioners believed that their entire cause of action had been dismissed for the time prior to February 19th. An appeal to the Fifth Circuit was taken. The Fifth Circuit ruled that the district court's decision was tentative, and the case was returned to the district court.

Respondents paid overtime at a one and one half times multiple from February 19, 1985 until June 22, 1985 when respondents discontinued the Ambulance Service, donated the assets to a private industry ambulance service and terminated the petitioners. Indeed, respondents got out of providing ambulance services

entirely; these respondents maintained no residual control over the private ambulance company which took over.

Trial concerning liability under National League was held on December 1, 1986.[4] On June 2, 1987 Judge Veron rendered judgment in respondents' favor. The district court concluded that the respondents were acting within their general police power when they began in 1971 providing ambulance services previously performed for years by area funeral homes, operating the service for several years, and then donating the assets to a private company and discontinuing the function. Accordingly,

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[4]Trial was bifurcated, limited to liability. Respondents stipulated to not paying overtime at the FLSA mandated minimum, and thus to liability, absent immunity under National League. Should petitioners be successful herein, a remand to the district court will be necessary to determine quantum. See A.14a.

Judge Veron found the Ambulance Service an immune function under National League. A.13a-30a.

C. Appeal to the United States Court of Appeals of the Fifth Circuit

Petitioners argued on appeal to the Fifth Circuit that Garcia I should be retroactively applied, and alternatively that the Ambulance Service could not on the record before that court be deemed a "traditional/integral" function of respondents' governments under National League. The Court of Appeals affirmed the trial court's judgment.

Concerning the retroactive application of Garcia I issue, the Court of Appeals cited and followed its March 9, 1988 decision in Garcia v. San Antonio Metropolitan Transit Authority, 838 F.2d

1411 (5th Cir. 1988), (hereinafter "Garcia II"), pending on a petition for certiorari, No. 88-39.

In this case, however, unlike Garcia II, the Fifth Circuit did consider the merits of petitioners' claims under National League. Without even mentioning anything from the record before it, that court concluded that ambulance services-in general - are closely related to the immune functions listed in National League, and it accordingly affirmed the district court. A.5a-9a.

REASONS FOR GRANTING THE WRIT

I.

This case, like Garcia v. San Antonio Metropolitan Transit Authority, Supreme Court No. 88-39, ("Garcia II"), comes to this Court from the Fifth Circuit and raises the question of whether Fair Labor Standards Act claims filed by public

employees prior to this Court's decision in **Garcia v. San Antonio Metropolitan Transit Authority**, 464 U.S. 528 (1985) ("Garcia I") are to be decided under the principles stated in that case or under those stated in **National League of Cities v. Usery**, 426 U.S. 833 (1976).

The Garcia II certiorari petition--which is presently pending -- states in detail the argument as to why that question urgently requires this Court's consideration. We agree with the points made there and rather than burdening the Court with a duplicative presentation, we incorporate pp. 7-22 of that petition here. For the reasons stated there, we ask the Court to either grant both petitions and set the cases for argument in tandem or, in the alternative, to grant the Garcia II certiorari petition and hold the instant case for disposition in a

manner consistent with the decision on the merits in that case.

II.

This case does differ from Garcia II in one critical respect. In that case, the Fifth Circuit did not decide that the employees' FLSA claims for the pre-Garcia I period were barred by the National League decision, but rather entered judgment for the public employer without reaching the merits at all. Here, in contrast, the Fifth Circuit did purportedly apply the National League standard to the employees' claims and concluded that the ambulance services in question are properly classified as traditional, integral governmental services immune from FLSA regulation under National League.

That ruling is patently wrong. We lay out its multiple flaws at some length

because the decision below is such a telling illustration of the inherent defects of the National League approach and such a compelling argument for applying the Garcia I standard to cases such as the instant one.

A. We note at the outset that in Garcia II, the Court of Appeals determined that Garcia I had made it impossible for that court to determine one way or the other whether mass transit is a "traditional" governmental function. See 838 F.2d at 1417-18.

Yet, less than three months after Garcia II was rendered, the Fifth Circuit blithely cites Garcia II as authority for not retroactively applying Garcia I to the present case and then without explanation, proceeds to adjudicate the merits of this case under National League as if its Garcia II self-imposed prohibitions did

not exist. A.1a-9a. The Court of Appeals' actions in Garcia II and the present case concerning the application of National League to cases pending at the time Garcia I was rendered are totally contradictory.

B. This Court in Garcia I expressly rejected as unsound in principle and unworkable in practice a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular state or local governmental function was "integral" or "traditional." 469 U.S. at 546-47. This Court wrote in that regard:

> Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

(469 U.S. at 546).

Nothing could better demonstrate the wisdom of Garcia I than the Court of Appeals' decision herein. In spite of respondents admitting at trial that prior to 1971 in Beauregard Parish, Louisiana, ambulance services were provided by private funeral homes, that neither the City nor the Parish had to deliver ambulance services as a local government function, and that respondents gave away the ambulance service with no residual controls over such service, the court below decided that in the Parish, ambulance service is a traditional and integral governmental function immune from FLSA regulation.

That conclusion is at war with the premises from which it is supposedly drawn and cannot stand a moment's reasoned inspection.

The Federal Court below totally failed to analyze this case in terms of National League's "traditional" "integral" governmental functions standards on the record before it. Rather, in grossly generalized terms with no reference to the record, the Fifth Circuit referred to the list of immune functions this Court listed in National League, and concluded that ambulance services are closely related to those functions.

Petitioners argued below that it is the "traditional" and "integral" standards which underlie this Court's list of functions in National League and that it is that standard which must be applied to the facts if National League governs here. The court below simply ignored that argument presumably because the undisputed and/or stipulated facts found

in the record clearly reveal a "non-traditional," "non-integral," "non-necessary," "non-basic function" which was being operated like a business by the respondents.

At trial, City Mayor Creighton Pugh and Parish Police Jury President Willie Vincent admitted that they did not have to provide ambulance services as a part of their governmental functions (Trial transcript pps. 43 and 73). How basic? how core? how integral? can a local governmental function be if the local officials entrusted to carry out all the local governments' activities conclude for themselves that the ambulance service never was a necessary function for them to provide via their respective governments?

When respondents' public records (Exhibits 11, 12, 13 and 14) and their stipulations show that they donated the

ambulances and equipment to a private company with no residual control over the company concerning how -- or if -- the company will deliver ambulance services in the western part of Louisiana, how can the Court of Appeals conclude that this Ambulance Service was "integral?"

Petitioners showed too that the Ambulance Service was not "traditional." The undisputed facts at trial showed that private ambulance companies have traditionally provided ambulance services in Louisiana (Pam Porter deposition, introduced without objection as Exhibit 15). In the present case, respondents took over ambulance services from area funeral homes and operated the ambulannce service for some years until donating the assets to a private company and ceasing to perform this activity at all.

Petitioners showed in addition that

respondents got sixty to seventy percent (60% - 70%) of each year's operating budget from private membership subscriptions and large service fees. The balance of each year's operating budget came from federal revenue sharing. These facts were undisputed. The membership fees and charges are exactly like the fees and subscriptions found in commercial ambulance services. Except for respondents supplementing each year's operating budget with federal revenue sharing funds, the ambulance service operated like private ambulance companies found throughout Louisiana.

Finally, petitioners showed that in this case, respondents elected not to treat these ambulance drivers like any other employees of the city or parish. Petitioners enjoyed no civil service protection, whereas other city/parish

employees did. Fireman and policemen had their own departments within the city, whereas the ambulance service was deliberately not accorded the status of a chartered department. Even when the charter was amended, respondents chose not to put the Ambulance Service as as department. Other employees received supplemental pay or overtime for overtime hours worked. Petitioners received neither.

Other "undisputed traditional function" departments were supported by taxes. Both respondents separately rejected attempts to have local taxes imposed and dedicated to the operation of the Ambulance Service. Rather, large membership subscriptions and service fees were imposed on those who actually bought and used the functions provided.

All of these facts were either

stipulated to or not objected to at trial. Neither the district court nor the Court of Appeal ever discussed the merits of this case in terms of the record evidence and the "traditional," "integral" governmental functions test of National League.

Thus, the conclusion of the court below that ambulance services are, in general, am immune function, is wholely unfaithful to the record and a gross misapplication of the standards first announced in National League and refined in progeny cases until overruled by Garcia I.

Even the Court of Appeals' citing of Gold Cross Ambulance v. City of Kansas City, 538 F.Supp 956 (W.D.Mo. 1982), aff'd on other grounds, 705 F.2d 1005 (8th Cir. 1983), cert. denied 105 S.Ct. 1864 (1985), is wrong.

Gold Cross was an anti-trust suit pertaining to the regulation of private ambulance services by a city, not the operation of an ambulance service by a city. Petitioners submit that a long regulation of particular services is not the same as a tradition of providing such services.

CONCLUSIONS

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-4461

ANTHONY BRYSON, ET AL.,

Plaintiffs-Appellants,

VERSUS

CITY OF DeRIDDER, ET AL.,

Defendants-Appellees

Appeal from the United States
District Court
For the Western District of Louisiana

(CV-84-1717)

(May 25, 1988)

Before GARZA, REAVLEY, and DAVIS, Circuit Judges,

PER CURIAM*

*Local Rule 47.5 provides: "The publication of opinions that have no

precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Plaintiffs-appellants, former employees of the City of DeRidder and the Parish of Beauregard, appeal the dismissal of their Fair Labor Standards Act claims for unpaid overtime wages under 29 U.S.C. S 207 (1985). For the following reasons, we affirm the judgment of the district court.

I.

Plaintiffs-appellants worked for the City of DeRidder and the Parish of Beauregard assisting in the operation of ambulances with the City-Parish Ambulance Service from June 19, 1981, to June 22, 1985. DeRidder and Beauregard began their ambulance service in 1971 when private funeral homes terminated this service.

While working for the City-Parish Ambulance Service, appellees [sic?] allege that they worked in excess of forty hours per week but were not paid at the overtime rate stipulated in the Fair Labor Standards Act (FLSA). On June 22, 1985, DeRidder and Beauregard succeeded in finding a private ambulance company to take over the service in the area and thus discontinued the City-Parish Ambulance Service and terminated appellants' employment.

Appellants filed suit seeking overtime pay under the FLSA. On cross motions for summary judgement, the district court granted the appellants' motion for partial summary judgment on their claim for overtime benefits from February 19, 1985, forward. The district court, however, ruled that Garcia v. San Antonio Metropolitan Transit Authority,

469 U.S. 528 (1985), would not be applied retroactively and, therefore, applied the standard set out in the National League of Cities v. Usery, 426 U.S. 833 (1976), for the period before February 19, 1985. Under the National League of Cities standard, the district court found that the ambulance service was a "traditional" or "integral" governmental function not subject to the minimal wage and overtime provisions of the FLSA. On appeal, the appellants argue that Garcia should have been retroactively applied so as to require the city and parish to comply with FLSA and, in the alternative, that the district court erred in concluding that the City-Parish Ambulance Service was a function immune from the overtime requirements of FLSA under the National League of Cities.

II.

In our consideration of Garcia's sister case following the Supreme Court's reversal of National League of Cities, we held that the Court's ruling should not be applied retroactively. Garcia v. San Antonio Metropolitan Transit Authority, 838 F. 2d 1411 (5th Cir. 1988). In determining that Garcia was non-retroactive, we applied the same test urged by the appellants in this case, Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The district court, therefore, did not err in applying National League of Cities rather than Garcia to the facts of this case.

III.

Since we have already held that Garcia is not be applied retroactively, we must consider whether the appellants are entitled to the FLSA overtime pay rates under the National League of Cities

standard.

In the National League of Cities, the Supreme Court considered a tenth amendment challenge to the FLSA. In 1974, Congress amended the FLSA to make its wage and overtime provisions applicable to all state and local government employees. The Supreme Court held that "insofar as the challenged [FLSA] amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress" under the commerce clause. National League of Cities, 426 U.S. at 852. The question before us, therefore, is whether an ambulance service is a "traditional" or "integral" function that is not subject to the FLSA under the National League of Cities standard.

In the National League of Cities, the

Supreme Court barred federal regulations that would impair "[those] activities [that] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. While the Court did not compile "an exhaustive catalog" of traditional governmental functions, id. at 851 n. 16, the Court did list a number of functions exempt from federal regulation, including "fire prevention, police protection, sanitation, public health, and parks, and recreation," Id. at 851.

We agree with the district court that an ambulance service is a traditional governmental function. Ambulance services are closely related to the governmental functions of fire prevention, police protection, and public health listed in

National League of Cities. Id. at 851. If the actions of a fire department or police department in rescuing a citizen from a fire or a crime is a traditional governmental function then the transportation to a hospital and emergency treatment of the same individual is no less so. See also Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-69 (W.D. Mo. 1982), aff'd on other grounds, 705 F.2d 1005 (8th Cir. 1983), cert. denied, 105 S. Ct. 1864 (1985) (holding ambulance services a traditional governmental function under National League of Cities). The district court did not err in concluding that ambulance service is a traditional governmental function under National League of Cities and, therefore, the appellants are not entitled to the FLSA overtime rate. The judgment of the district court is

therefore

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

PRESENT: HON.

EARL E. VERON, JUDGE, Presiding

JOE WILLIAMS, Court Reporter

JO ANN BENOIT, Minute Clerk

May 16, 1985

COURT OPENED: 9:00 A.M.

COURT ADJOURNED: 9:40 A.M.

ANTHONY BRYSON, ET AL

vs. CITY OF

DeRIDDER, ET AL

APPEARANCES

Randall G. Wells for Petitioners

James K. Nichols for City of DeRidder

William E. Peques, III, for Parish of Beauregard

CASE CALLED FOR

_X__ Hearing on motions

_____ Jury selection only

_____ Trial with/without jury, _____ day

_____ Other _____

Filings:_____

_____

Motion filed February 15, 1985 by the City of DeRidder to dismiss is partially granted. The claims of the plaintiff prior to February 19, 1985 are dismissed and the claims of the plaintiff after February 19, 1985 remain in effect based on the GARCIA decision.

Motion filed April 29, 1985 by the plaintiff for partial summary judgment is partially granted as to liability for overtime pay on work post-dating the GARCIA decision.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

ANTHONY BRYSON, ET AL :

VS. :

CITY OF DeRIDDER, ET AL.,:

CIVIL ACTION NO.: 84-1717

J U D G M E N T

For written reasons assigned this date;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, and against the plaintiffs, dismissing plaintiff's claims for overtime pay for the period preceding February 19, 1985 at their cost.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 2nd day of June, 1987.

s/ Earl E. Vernon
EARL E. VERON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

ANTHONY BRYSON, ET AL :

VS. :

CITY OF DeRIDDER, ET AL.,:

CIVIL ACTION NO. 84-1717

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VERON, J.

OPINION

This matter came for trial on

December 1, 1986 with jurisdiction being invoked pursuant to 29 U.S.C. S 216 (b) of the Fair Labor Standards Act of 1938. Plaintiffs Anthony Bryson, Bennie Lewis, Donnie Lewis, Roger L. Pickle, John Satcher, Jr. and George Lankford aver that defendants, City of DeRidder and Parish of Beauregard, as joint operators of the City-Parish Ambulance Service, violated 29 U.S.C. S 207 (a) (1) and/or (2) by failing to pay plaintiffs overtime wages as prescribed by FLSA. A federal question is presented and this Court has jurisdiction. This trial has been bifurcated and this opinion covers only the question of liability. The issue of damages has been reserved for trial at a later date.

FINDINGS OF FACT

The testimony, evidence and admissions presented at trial reveal the

following facts that are essential to the resolution of this case:

The City of DeRidder is a City within the State of Louisiana and is a political subdivision of the State. The Parish of Beauregard is a Parish within the State of Louisiana and is also a political subdivision of the State.

Prior to 1971, ambulance services were provided by funeral homes in the City of DeRidder and Beauregard Parish. Even before that, ambulance services were provided by the police, firemen and even private citizens who took those in need of emergency medical care to local hospitals. In 1971, the last of the funeral homes which still provided ambulance service terminated that service.

The availability of an ambulance service was an absolute necessity for city and parish inhabitants. In 1971, as an

immediate response to the termination of ambulance service by funeral homes, the City, in conjunction with the Parish , began to provide ambulance service within the City and Parish. The City-Parish Ambulance Service, as it became known, was a function of the City and the Parish from 1971 to June 22, 1985.

The City, through it's city counsel, and the Parish, through its police jury, passed ordinances and resolutions concerning the operation of the City-Parish Ambulance Service. The City and the Parish contributed or were to contribute equal amounts of money each year toward the operation of the ambulance service. While the City administered the daily operations of the City-Parish Ambulance Service, it did so directly or at least indirectly in the interest of the Parish in relation to the employment of

the plaintiffs. The ambulance service was the only sustained joint activity of the City and the Parish, at any time prior to, during or after the ambulance service was in operation.

Each plaintiff in this case worked for the City-Parish ambulance service for some, if not all of the time, from June 1981 to June 22, 1985. The work performed by the plaintiffs when they were employees of the ambulance service simultaneously benefitted both the City and the Parish. And, while the plaintiffs were employed with the ambulance service, each of them worked in excess of 40 hours in a seven day work week for some, if not all of the work weeks, from June 1981 to June 22, 1985 and was not paid compensation for each hour worked in excess of 40 hours in a work week at a rate of not less that one-and-one half times the regular rate at

which he was employed.

The contributions respectively made by the Parish and City in each year did not constitute the entire budget for each respective budget year for the City-Parish Ambulance Service operated. The ambulance service was funded in part through membership subscriptions. A membership subscription allowed a resident of the City and/or Parish to pay a fee ($50.00 per year) and utilize up to $600.00 worth of ambulance services. Once the $600.00 of service was used, the person utilizing the ambulance service would pay according to a service fee schedule. A City or Parish resident who elected not to become a subscribing member to the ambulance service could none the less use the ambulance service. The non-member, however, would have to pay a least the $50.00 fee plus a per-mile charge to use

the ambulance service. The ambulance service was also funded out of the City and Parish's general funds which were in part made up of federal revenue sharing funds. No taxes were ever dedicated to the ambulance service.

The City/Parish governments did not begin operation of the ambulance service until after they had unsuccessfully attempted to lure private ambulance companies from other regions of the state into providing service to the City of DeRidder and Beauregard Parish and were unsuccessful. The City-Parish Ambulance Service proved to be a costly economic burden on both the City and Parish, and in the early 1980's, the City/Parish began to search for an alternative means of providing ambulance services. They once again attempted to convince private ambulance companies to provide ambulance

services within the City and Parish. They were however unsuccessful. They also attempted to place the ambulance service under the control and operation of a local hospital, but this attempt also met with failure. Finally, in 1985, the City/Parish governments were able to convince Metropolitan Emergency Services, Inc., a private ambulance service company, to begin operations in the City of DeRidder and Parish of Beauregard. As part of the bargain struck between the City/Parish and the private ambulance company, the City donated the ambulances and equipment to the private company. Having made certain that a continuous and adequate ambulance service would be available to their citizens, the City/Parish governments discontinued the City/Parish Ambulance Service on June 22, 1985.

CONCLUSIONS OF LAW

Congress amended the FLSA in 1974 to include the states and their political subdivisions within its scope. 29 U.S.C. S 203 (d), (s) (6), and (x). In National League of Cities v. Usery, 426 U.S. 833 (1976), the United States Supreme Court held that the Tenth Amendment to the United States Constitution prevented Congress from interfering with the employment practices of states and their political subdivisions in certain governmental activities. In particular, the Supreme Court held that the minimum wage and overtime provisions of the FLSA were not applicable to the states and their subdivisions if the provisions would "impermissibly interfere with the integral governmental functions." Id. at 851. The Supreme Court, however, overruled National League of Cities, on

February 19, 1985, in the case of Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985), finding that there was nothing in the minimum wage and overtime provisions of the FLSA that was destructive of state sovereignty or violative of any constitutional provision.

This court, in the instant matter, has already held that Garcia does not apply retroactively, but only from the date of the decision forward, and that therefore, defendants, are subject to the minimum wage and overtime provisions of the FLSA after February 19, 1985. The National League of Cities standard is still to be applied for the period prior to February 19, 1985. The question then left for our determination is whether or not the ambulance service provided by the City/Parish governments was a

traditional/integral government function.

After National League of Cities, the Supreme Court set forth, in Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 678 (1982), four conditions that must be satisfied before a government activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the states as states." Second, the statute must "address matters that are indisputable attributes of state sovereignty." Third, state compliance with the federal obligation "must directly impair the state's ability to structure integral operations in areas of traditional governmental functions." And finally, the relation of state and federal interests must not be such that "the nature of the federal interest justifies

state submission." In the instant matter the partes agree that the third condition is the focus of concern.

The Supreme Court in Garcia recognized that the task of determining which state functions are immune is a very difficult one. In large part that is the very reason that the Court overruled National League of Cities. However, it remains this Court's burden to apply the rationale of National League of Cities to the instant matter.

In National League of Cities, the Court stated that:

> "[the] application [of the FLSA amendments] will... significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual function of administering the public law and furnishing public services. 16 Indeed, it is functions such as these which governments are created to provide,

services such as these which the States have traditionally afforded their citizens.
426 U.S. at 851.

In footnote 16, the Court noted:

> These examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of the state and local governments.

Id.

And by overruling Maryland v. Wirtz, 392 U.S. 183 (1968), the Supreme Court in National League of Cities by implication held that the operation of public hospitals was also an immune government functions.

It is clear that the operation of the ambulance service in question here was a public service like those enumerated in National League of Cities which are within the area of traditional operations,

despite plaintiff's contentions to the contrary. Plaintiffs, in particular, point to the fact that ambulance services were previously provided by private companies and are once again being provided by a private company. This court, however, finds plaintiffs' argument without merit. The City/Parish operated the ambulance service as a governmental function and not as a private enterprise.

As discussed above, prior to 1971, ambulance services in the City and Parish were provided by area funeral homes. By 1971, all of those funeral homes, due to economic necessity, had ceased to provide ambulance services. The people of the City and Parish were faced at that time with the possibility of being left without the benefit of an ambulance service, an important and essential service for the citizens of any community.

The City and Parish governments, in response to the great community need for ambulance service, attempted to hire private ambulance companies from other regions of the state to extend their operations to the City of DeRidder and Beauregard Parish, but were unsuccessful. Faced with the possibility that the people of the City and Parish would go without the much needed ambulance service, the City and Parish governments were forced to set up their own jointly-operated ambulance service.

The service, over the 14 years that the City/Parish operated it, proved to be a severe economic burden on the City/Parish and the government bodies sought a solution. They began, in 1983, to search for other means of providing the essential ambulance services to the community without the necessity of the

governmental bodies having to incur the resultant economic losses. Eventually, the private ambulance company, Metropolitan, agreed to begin operation in the City and Parish, if the City/Parish donated the existing ambulance and equipment to Metropolitan. This was done and Metropolitan began operations, thus allowing the City/Parish Ambulance Service to discontinue its services as of June 22, 1985. At all times, the City/Parish governments were concerned with making sure that their citizens had a continuous and adequate ambulance service available to meet their needs.

Even in overruling National League of Cities, the Supreme Court in Garcia recognized that other courts had found that the regulation of ambulance services is a protected government function under National League of Cities. Garcia 105 S.

Ct. at 1011. In Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956 at 968 (W.D. Mo. 1982), aff'd on other grounds, 705 F. 2d 1005 (8th Cir. 1983), cert. denied _____ U.S. _____, 105 S. Ct. 1864 (1985), it was held that the "operation of ambulance service is an exercise of a city's governmental function" necessary to protect its citizens and that it thus is within the general police power.

Here, the City/Parish governments, faced with a situation which endangered the health and safety to their citizens, took the only course of action available, stepping in to provide the essential ambulance service itself. The City/Parish governments did not discontinue their ambulance service until a private provider of services could be found. In fact, they had to make certain concessions

for the new private operator to take over, namely that they donated their ambulances and equipment to the new operator. The City/Parish governments were only acting within their general police power.

In as much as the Court finds that the ambulance service was an immune government function under National League of Cities, the Court must hold that the defendants are not subject to the minimum wage and overtime provisions of the FLSA for the period prior to the Supreme Court's decision in Garcia.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 2nd day of June, 1987.

s/ Earl E. Vernon
EARL E VERON
UNITED STATES DISTRICT JUDGE

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

Fair Labor Standards Act of 1938, 52 Stat. 1060 as amended, 29 U.S.C. S S 201 et seq.:

MAXIMUM HOURS

SEC. 7. (a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods of commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

PENALTIES

SEC. 16 * * * (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be

paid by the defendant and costs of the action.

The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefore under the provision of this subsection.

Portal-to-Portal Pay Act of 1947, 62 Stat. 84, 29 U.S.C. S S 251, et seq.

SEC. 10 RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.--

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to

the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be-

(1) in the case of the Fair Labor Standards Act of 1938, as amended-- the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act--the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act-- the Secretary of Labor.

29 C.F.R. Part 775

S 775.2 SPECIAL ENFORCEMENT POLICY CONCERNING STATES AND POLITICAL SUBDIVISIONS.

(a) On June 24, 1976, the United States Supreme Court ruled in **National League of Cities, et al. v. Usery**, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA) are not constitutionally applicable to the integral operations of the States and their political subdivisions in areas of traditional governmental functions. Such areas include, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. They do not include, among others, the operation of a railroad by a State, 426 U.S. at 854,n.18.

(b) In view of the **National League** decision, the Secretary will not file suit

to enforce the minimum wage and overtime compensation provisions of the FLSA against a State or its political subdivisions unless at least 30 days notice has first been given that, in the opinion of the Administrator, the activities in question are not integral operations in areas of traditional governmental functions. Such notice will be provided either by specific notification of the employing body in question or by general notification by publication in the FEDERAL REGISTER in the form of amendments to S 775.3. A reasonable opportunity will be allowed the employing body, after the notice of the administrative determination, to come into compliance voluntarily before suit is brought.

(c) Each such notice will be made available to wage hour reporting services

and to any interested person or association, for information or further publication, except for deletions reasonably necessary to protect the privacy of individual employers and employees.

(d) Because of the complexity of the questions raised by the **National League** decision, it would be inappropriate to seek liquidated damages in addition to back pay in cases to enforce the minimum wage and overtime compensation provisions of the Act against States or their political subdivision, except as to activities determined by prior controlling judicial decision, or by prior administrative ruling published in the FEDERAL REGISTER, not to be integral operations in areas of traditional governmental functions. The Secretary will therefore not seek liquidated damages

as to activities not covered by such decision or ruling, or for periods of employment prior to the publication of such decision or ruling.

(e) As already noted, the National League decision applies only to the minimum wage and overtime compensation provisions of the FLSA. This section and S 775.3 accordingly do not apply to claims arising under:

(1) The Equal Pay Act of 1963 (see Usery v. Allegheny County Institution District, 544 F.2d 148 (C.A. 3, 1976), cert. denied 430 U.S. 946 (1977); Usery v. Charleston County School District, 588 F.2d 1169 (C.A. 4, 1977); Pearce v. Wichita County, 590 F.2d 128 (C.A. 5, 1979); Marshall v. Owensboro-Daviess County Hospital, 581 F.2d 116 (C.A. 6, 1978); and Marshall v. City of Sheboygan, 577 F.2d 1 (C.A. 7, 1978)).

(2) The Age Discrimination in Employment Act of 1967 (see **Arritt v. Grissell**, 567 F.2d 1267 (C.A. 4, 1977)); **Usery v. Bd. of Education of Salt Lake City**,421 F. Supp. 718 (D. Utah 1976); **Aaron v. Davis**, 424 F. Supp. 1238 (W.D. Ark. 1976); and **Remmick v. Barnes County**, 435 F. Supp. 914 (D. N.D. 1977).

(3) The child labor provisions of the Fair labor Standards Act.

(4) The protective provisions of section 15 (a) (3) of the Act, making it unlawful to discriminate against any employee for participating or assisting in FLSA proceedings.

[44 FR 75629, Dec. 21, 1979]

S 775.3 NONTRADITIONAL FUNCTIONS OF STATES AND THEIR POLITICAL SUBDIVISIONS

(a) In the **National League** decision, it was made clear that the operation of a

railroad by a State or its political subdivisions is not an integral operation in the area of traditional governmental functions. 426 U.S. 833, 854 n.18.

(b) For the purpose of the notice referred to in S 775.2(b), the Administrator has determined that the following functions of a State or its political subdivisions are not traditional. From time to time, this section will be amended to list other such functions determined not to be traditional. The date listed after each function is the date of original publication in the FEDERAL REGISTER. This is the effective date of the general notification described in S 775.2 (b). However, where an employing body has actual notice on an earlier date of the position taken by the Administrator, that earlier date is the effective date of the

specific notification described in S 775.2(b).

(1) Alcoholic beverage stores December 21, 1979.

(2) Off-track betting corporations December 21, 1979.

(3) Local mass transit systems December 21, 1979.

(4) Generation and distribution of electric power December 21, 1979.

(5) Provision of residential and commercial telephone and telegraphic communication December 21, 1979.

(6) Production and sale of organic fertilizer as a by-product of sewage processing December 21, 1979.

(7) Production, cultivation, growing or harvesting of agricultural commodities for sale to consumers December 21, 1979.

(8) Repair and maintenance of boats and marine engines for the general public

December 21, 1979.

[44 FR 75630, Dec. 21, 1979]

S 775.4 TRADITIONAL FUNCTIONS OF STATES AND THEIR POLITICAL SUBDIVISIONS

(a) In the National League decision, it was made clear that schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation are traditional functions or activities of States and their political subdivisions.

(b) In addition, the Administrator has determined that the following functions of a State or its political subdivisions are traditional (From time to time, this section will be amended to list other such functions determined to be traditional.)

(1) Libraries.

(2) Museums.

[44 FR 75630, Dec. 21, 1979]